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9
10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**

12 In the Matter of:) Supreme Court No. R-11-0033
13)
14 PETITION TO AMEND ER 3.8 OF) **COMMENT OF LAWYERS IN**
15 THE ARIZONA RULES OF) **SUPPORT OF PETITION TO**
16 PROFESSIONAL CONDUCT (RULE) **AMEND ER 3.8 OF THE**
42 OF THE ARIZONA RULES OF) **ARIZONA RULES OF**
SUPREME COURT) **PROFESSIONAL CONDUCT**

17 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the
18 undersigned attorneys hereby file this comment in response to the Order issued
19 by this Court on August 28, 2013 Reopening the Comment Period on the
20 Petition to Amend Ethical Rule (ER) 3.8 of the Arizona Rules of Professional
21 Conduct. We write to support the Court's current proposal to improve the
22 ethical rules in this important area.

23 In response to troubling lack of guidance currently supplied by the Model
24 Rules of Professional Conduct in cases of wrongful conviction, the Criminal
25 Justice Section of the ABA, together with ten additional organizational co-
26 sponsors, drafted an amendment to Model Rule 3.8 in 2008. Importantly, the
27 ABA participants were diverse—including prosecutors, judges, professors, and

1 defenders. The resulting amendment overwhelmingly passed the House of
2 Delegates without any opposition or debate.¹

3 This Court's proposed, revised rule incorporates the essence of the ABA
4 2008 amendment, and we simply write to support the Court's current, proposed
5 revision. Commenting prosecutors have said that they do not need a rule
6 because they already follow essentially the same steps now clearly articulated in
7 the Court's rule. Indeed, good prosecutors do follow similar steps.² For this
8 reason, there would appear to be no legitimate controversy if the Court's
9 proposed, revised rule is adopted.

10 CONCLUSION

11 The Court should adopt its proposed rule. Justice is not the product of a
12 liberal or conservative agenda, and it is not pro-prosecution or pro-defense. It is
13 indisputable that wrongful convictions regrettably occur in the criminal justice
14 system, and Arizona's ethics rules currently provide very little post-conviction
15 guidance to prosecutors. The Court's proposed rule pays overdue attention to
16 the second half of the prosecutor's "twofold aim"—"that guilt shall not escape
17 *or innocence suffer*."³

18 ¹ Similarly, although its suggested language differed in several respects,
19 our State Bar voted unanimously to urge this Court to adopt a rule requiring
20 prosecutors to disclose evidence of wrongful convictions and, in appropriate
21 circumstances, to inquire into the conviction and seek to vacate it. Therefore,
22 both the ABA and the State Bar are in agreement in principle.

23 ² As just two examples: (1) Wisconsin was the first state to adopt the rule,
24 and its own Wisconsin District Attorneys Association filed the rule change
petition, and (2) the National District Attorneys Association adopted an ethical
standard similar in principle to the proposed rule.

25 ³ *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). As
26 this Court has observed, the "prosecutor's interest in a criminal prosecution is
27 not that it shall win a case, but that justice shall be done." *In re Peasley*, 90
28 P.3d 764, 772–73 (Ariz. 2004) (internal quotation omitted).

1 **RESPECTFULLY SUBMITTED** this 15th day of October, 2013.

2 By /s/ Mark I. Harrison
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5 /s/ Terry Goddard
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10 /s/ Stanley G. Feldman
11 **Chief Justice Stanley G. Feldman (ret.)**
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13 /s/ Frank X. Gordon
14 **Chief Justice Frank X. Gordon (ret.)**

15 /s/ Charles E. Jones
16 **Chief Justice Charles E. “Bud” Jones (ret.)**

17 /s/ Robert D. Myers
18 **Hon. Robert D. Myers (ret.)**

19 /s/ Thomas A. Zlaket
20 **Chief Justice Thomas A. Zlaket (ret.)**

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23 Electronic copy filed with the Clerk
24 of the Supreme Court of Arizona
25 this 15th day of October, 2013.

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28 * Institutional designations are for identification purposes only.

1 Copies of this Comment mailed
2 this 15th day of October, 2013, to:

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